Statement of the Case

The petitioner, Junius Redwood, was arrested on May 17, 1968, and, in complaints filed in the New York City Criminal Court, was charged with assault in the second degree [N.Y. Penal L. §120.05]; criminal trespass in the second degree [N.Y. Penal L. §140.10]; and operating a motor vehicle while in an intoxicated condition [N.Y. Veh. & Traf. L. §1192(2)]. After several adjournments at defendant's request and one failure to appear, a hearing on the felony charges was held in the New York City Criminal Court on November 18, 1968. At this hearing, the court with the People's consent reduced the felonious assault charge to assault in the third degree [N.Y. Penal L. §120.00]. The other misdemeanor charges remained undisturbed. Also at this hearing, petitioner made his first motion for a trial by jury, which the court denied pursuant to §§40 and 42 of the New York City Criminal Court Act.

On December 4 and 5, 1968, the petitioner was tried before a three-judge panel of the New York City Criminal Court, as prescribed in §§40 and 42 of the New York City Criminal Court Act. At trial, he made a further oral request for a trial by jury which the court denied.

At trial, the People proved that on May 17, 1968, at about 12:15 a.m. the petitioner drove his car at high speed into a restricted area at the Transit Authority yards at 147th Street and Lenox Avenue, New York City. In entering the yards, the petitioner narrowly missed the gate keeper, Walter Wilson, who was forced to jump out of the car's path to avoid being struck. Once inside the yards,

the petitioner drove around erratically, eventually smashing into the wall of a brick circuit breaker building. After screaming obscenities and threatening a Transit Authority employee with death, the petitioner was eventually arrested and taken into custody by N.Y.C. Transit Authority Patrolman Gunnar Huvala. Patrolman Huvala noticed at this time that the petitioner staggered while he walked, and had a strong odor of alcohol on his breath.

After his arrest, the petitioner was taken to the police station in the back seat of a radio squad car which also contained three police officers. At about 12:30 a.m., as the car stopped in front of the station house, the petitioner kicked the driver of the car, Patrolman Michael Delligatti, in the left side of his face, damaging the patrolman's left ear.

At the station house, Patrolman Huvala further observed that the defendant's speech was slurred, and administered further tests to the petitioner; in the balance test, the petitioner staggered and could not make his turns properly; on the finger-to-nose test, he could not touch his finger to his nose; on the coin-scattering test, he had great difficulty in picking up any coins.

At the conclusion of trial, the petitioner was convicted of the misdemeanors of assault in the third degree [New York Penal L. §120.00] and operating a motor vehicle [Veh. & Traf. L. §1192(2)], one judge dissenting from the verdict on the latter charge. Judgment was rendered on March 28, 1969, and Redwood was sentenced to a conditional discharge on the assault count, and to pay a fine of $100 or to serve 10 days' imprisonment, as well as rev-

ocation of his operator's license on the intoxicated driving count.

On appeal to the Supreme Court of the State of New York, Appellate Term, First Judicial Department, the petitioner argued that the evidence did not establish that he was guilty of the intoxicated driving charge beyond a reasonable doubt. Further, he argued that the complaint charging intoxicated driving was improperly drawn and defective, that the court abused its discretion in denying his request at trial for a continuance in order to obtain an additional witness, and that he was denied due process by virtue of the trial court's denial of his motion for a trial by jury.

The Supreme Court rejected these contentions and unanimously affirmed petitioner's conviction on May 6, 1970.

On May 26, 1970, the petitioner, seeking further review by the N.Y. Court of Appeals, filed a notice of appeal from the judgment of the Appellate Term of the Supreme Court of the State of New York with the clerk of the Supreme Court, New York County.

However, the New York Code of Criminal Procedure provides that in order for an appeal to be taken to the New York Court of Appeals, the party must first make application for leave to appeal within 30 days by seeking a certificate granting permission to appeal from a judge of the Court of Appeals or a justice of the Appellate Division of the Supreme Court [N.Y. Code of Cr. Proc. §520]. Assuming that such a certificate is granted, the appellant

may then file a notice of appeal within 15 days of the granting of the certificate. This notice is filed in duplicate with the clerk of the Supreme Court in the county in which the judgment being appealed from was rendered. A copy is then sent to the Clerk of the Court of Appeals in Albany. In the instant case the petitioner did not seek such a certificate. Accordingly, on April 6, 1971, Judge SCILEPPI of the New York Court of Appeals dismissed defendant's notice of appeal as untimely for failure to comply with the requirements of the statute.

In the instant petition, petitioner apparently seeks certiorari pursuant to 28 U.S.C. §1257 (3). In his petition he alleges that he was denied process of law because the trial court denied his request for a trial by jury pursuant to Sections 40 and 42 of the New York City Criminal Court Act.

ARGUMENT

POINT I

Petitioner's motion is untimely, as the New York Court of Appeals properly dismissed his application for leave to appeal.

Petitioner's appeal was unanimously affirmed by the New York Supreme Court, Appellate Term, First Judicial Department, on May 6, 1970. It is from this judgment that petitioner appeals. However, the petitioner did not start the instant proceeding until April 10, 1971 when he filed with this Court a copy of the order of Judge Scileppi of the New York Court of Appeals, dated April 6, 1971, denying his application for leave to appeal to that Court

as being untimely. Accordingly, the petitioner has failed to meet the requirement of Rule 22 (1) of this Court, which requires the filing of a petition for a writ of certiorari and certified record within ninety days of the day of judgment.

The petitioner failed to perfect his state remedy by seeking a certificate granting leave to appeal from a judge of the Court of Appeals or a Justice of the Appellate Division of the N.Y. Supreme Court within 30 days of the entry of judgment, as is required by statute [N.Y. Code of Cr. Proc. §520]. Instead, he simply filed a notice of appeal with the clerk of the Supreme Court of New York County. Properly, this notice is filed within 15 days after the granting of such a certificate [N.Y. Code of Cr. Proc. §521]. A duplicate copy is then sent to the clerk of the Court of Appeals in Albany, New York, and the case is docketed.

Because of petitioner's failure to follow this procedure, the Court of Appeals found itself unable to hear the case, and Judge Scileppi of that court accordingly dismissed defendant's notice of appeal as untimely on April 6, 1971. That decision was not made on the merits of petitioner's case, but purely on the basis of the untimeliness of his application.

Accordingly, the judgment which petitioner now seeks to review is that of the Appellate Term of the New York Supreme Court, rendered May 6, 1970. Although this Court has stated that Rule 22 is not jurisdictional or mandatory and may be waived in proper cases in the interests of justice, no such considerations are present here. The peti-

tioner was represented by able counsel throughout the proceedings, and has shown no extenuating circumstances justifying such action. By contrast, in these cases where a waiver was granted, there has generally been either a near-compliance with the Rule or an extraordinary reason why it should be waived. Cf. *Smith* v. *Mississippi,* 373 U.S. 238 (1962) (the petition reached this Court one day late, but was mailed four days earlier); *Arnold* v. *North Carolina,* 376 U.S. 773 (1964) (a capital case where the petition was two weeks late); *Banks* v. *California,* 382 U.S. 420 (1966) (the petition was timely delivered by a prisoner to prison authorities, who mailed it after the necessary period had expired). Nothing of this nature was involved in the instant petition. Accordingly, it should be dismissed.

POINT II

The petitioer's right to a trial by jury, as interpreted by this Court's decision in *Duncan* v. *Louisiana,* 391 U.S. 145 (1968), was not infringed, and *Baldwin* v. *New York,* 399 U.S. 66 (1970) should not be applied retroactively to his case.

The petitioner contends that he was denied his right to a trial by jury. He alleges that he faced a possible sentence of two years and three months' imprisonment at trial, and accordingly, since judgment was rendered against him on March 28, 1971, after the effective date of this Court's decision in *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) he contends that the failure of the New York City Criminal Court to grant him a trial by jury pursuant to §§40 and 42 of the New York City Criminal Court's Act violated his right to due process. He further alleges that these sections are unconstitutional.

In the alternative, petitioner argues that this Court's decision in *Baldwin* v. *New York,* 399 U.S. 66 (1970), which holds that a defendant facing a term of imprisonment of more than six months is entitled to a trial by jury, should be applied retroactively to his case. *Baldwin* was decided on June 22, 1970. These contentions are without merit.

First, petitioner is mistaken in his contention that he faced a possible sentence of two years and three months' imprisonment. He was charged with operating a motor vehicle in an intoxicated condition, a misdemeanor punishable by a maximum term of imprisonment of one year [N.Y. Veh. & Traf. L. §§1192(2), 510(2); N.Y. Penal L. §§55.10(7) (c), 70.5(3)], assault in the third degree, a misdemeanor punishable by a maximum term of imprisonment of one year [N.Y. Penal L. §§70.15(1), 120.00] and criminal trespass in the second degree, a misdemeanor punishable by a maximum term of imprisonment of three months [N.Y. Penal L. §§70.15(2), 140.10]. Thus, petitioner evidently arrived at his figure of a possible sentence of two years and three months by adding the possible sentences for each of these offenses. However, since all of the offenses were related as parts of a single incident, any sentences imposed by the court would have had to run concurrently [N.Y. Penal L. §§60.10(2) (a) and (d), 70.25(2) and (3)]. This rule was made clear by the New York Court of Appeals, which construed these provisions in *People* v. *Lopez,* 28 N.Y.2d 148 (1971). Accordingly, the maximum period of incarceration which petitioner faced at trial was one year. Since this period was considered by New York Courts to be within the limits set by *Duncan,* petitioner's rights were not violated under this standard.

However, the petitioner further argues that he was denied a jury trial under the standard of this Court's decision in *Baldwin* v. *New York,* 399 U.S. 66 (1970). Decided on June 22, 1970, *Baldwin* held that those facing incarceration for periods in excess of six months would be entitled to a trial by jury. However, this case was decided over a year after petitioner's trial, and both state and federal authorities have properly refused to give it retroactive effect, a result that this Court has declined to disturb. *People* v. *Dargan,* 27 N.Y. 2d 100 (1970), *cert. denied* 400 U.S. 920, *reh. den.* 400 U.S. 1002 (1971) ;*U.S. ex rel. Farmer* v. *Kosan,* 440 F. 2d 1256 (2d Cir. 1971); *U.S. ex rel. Butler* v. *Thomas,* 440 F. 2d 992 (2d Cir. 1971), *reversing* 319 F. Supp. 524 (S.D.N.Y. 1970), *cert. denied* —— U.S. —— (10/12/71).

Further, on the merits of petitioner's claim, *Baldwin* should not be given retroactive effect. In *De Stefano* v. *Woods,* 392 U.S. 631 (1968) this Court reiterated the considerations that affect the judgment whether a case reversing prior doctrine in the area of the criminal law should be applied only prospectively or retroactively:

> "(a) The purpose to be served by the new standards.
>
> (b) The extent of the reliance by law enforcement authorities on the old standards.
>
> (c) The effect on the administration of justice of a retroactive application of the new standards." 392 U.S. 631, 632.

In *De Stefano,* it was held that these considerations favored applying *Duncan* prospectively only. They are

equally persuasive on the question of the retroactivity of *Baldwin*. Drastic disruption of the administration of justice would flow from applying the *Baldwin* ruling to cases already tried. Hundreds, if not thousands, of defendants who were tried before June 22, 1970, on Class A misdemeanor charges, without a jury, were sentenced in the New York City Criminal Court. If *Baldwin* is retroactive to cases already tried, these cases must be thrown out. In addition, thousands of convictions entered since *Duncan* could be needlessly overturned, and the cases reopened. This chaos would not be required by justified concern that the fact-finding process previously employed in the New York City Criminal Court, a trial before a court without jurors, was unreliable. The Supreme Court rejected that concern in *De Stefano* v. *Woods, supra.* Finally, it is indisputable that New York State courts, prosecutors and other officials justifiably have relied on a conclusion that a jury trial was not constitutionally required in misdemeanor cases in the New York City Criminal Court. Bench trials had been the practice, undisturbed by the courts, from the inception of New York's statehood, and the *Duncan* decision did not vitiate that reliance.

Moreover, this Court in *Duncan* tendered strong suggestions that a potential one-year sentence did not require a jury trial. The Court deemed significant the fact that

> "in 49 out of the 50 states crimes subject to trial without a jury * * * are punishable by no more than one year in jail." 391 U.S., at 161.

Bloom v. *Illinois,* 391 U.S. 194 (1968) contains a similar suggestion that one year's imprisonment is an acceptable boundary between serious and petty offenses under the

Sixth and Fourteenth Amendments. In *Bloom,* the Court, having decided "to treat criminal contempt like other crimes insofar as the right to jury trial is concerned" [*id.* at 210], invalidated a sentence of two years for criminal contempt which was imposed without a jury trial. Referring to the diverse and confusing provisions in the various states as to the scope of punishment for criminal contempt, the Court concluded, in an opinion by Mr. Justice WHITE:

> "It is clear, however, that punishment for contempt is limited to one year or less in over half the States." *Id.* at 206-207, n. 8.

Since neither *Duncan* nor *Bloom* involved a one-year sentence, the Court's repeated references to the one-year cutoff was noteworthy in New York.

The reasonableness of continuing the New York practice after *Duncan* is confirmed by the request of New York State in the *Duncan* case that the present New York system be preserved. The Attorney General of New York, in his *amicus curiae* brief in *Duncan,* referred the Court to the New York City Criminal Court Act, and concluded:

> "The Court should render a decision which does not interfere with trial without a jury in the class of criminal prosecution in which it is permitted in New York."

Moreover, when the Court held that *Duncan* itself was not retroactive, it emphasized that

> "both *Duncan* and *Bloom* left open the question whether a contempt punished by imprisonment for one year is, by virtue of that sentence, a sufficiently serious mat-

ter to require that a request for jury trial be honored." *De Stefano* v. *Woods*, *supra* at 633.

From all appearances, the Court carefully avoided invalidating the New York statutes, though it easily could have disposed of the matter and prevented further litigation on the issue. Undeniably, continued reliance on the velidity of the New York system was reasonable, even after *Duncan*.

People v. *Donaldson*, 25 N.Y.2d 38 (1969), which applied *People* v. *Fuller*, 24 N.Y.2d 292 (1969) retroactively, is distinguishable. *Fuller* had held that there was no rational basis for a distinction, as to the opportunity for a jury trial, between criminal and civil commitment for narcotic addicts, and that the denial of a jury trial to criminal addicts on the issue of addiction violated equal protection. In *Donaldson* this Court applied *Fuller* retroactively for reasons totally absent from the case at bar: "*Fuller* declared no new constitutional right, devised no new criminal procedure, and did not strike down any prior decision giving apparent constitutional sanction to the procedure there found unconstitutional." 25 N.Y.2d at 42. Moreover, "existing decisional law with respect to the requirement of the equal protection of the laws clearly indicated the statute's constitutional deficiency," and the procedure was struck down by this Court, in a unanimous holding, at the very first opportunity. *Id.* at 43. In the present case, the procedure in question, far from being clearly illegal, was upheld by this Court in a reasonable opinion [*People* v. *Baldwin*, 24 N.Y. 2d 207 (1969)], and was later struck down only over sharp dissent in the Supreme Court. Mr. Justice WHITE's opinion, speaking for three justices of the five-justice majority, concedes that the New York procedure was not clearly il-

legal. *Baldwin* v. *New York* was no more "foreshadowed" by *Duncan* than *Miranda* v. *Arizona,* 384 U.S. 436 (1966), which is not retroactive, was "foreshadowed" by *Malloy* v. *Hogan,* 378 U.S. 1 (1964) and *Escobedo* v. *Illinois,* 378 U.S. 478 (1964).

Thus, although *Duncan* was a steppingstone in the new direction, there is ample precedent for holding that the *Baldwin* case, not any prior case, is the appropriated landmark for determining which cases should be affected by the new rule. The courts have frequently chosen the date of a new decision, not previous cases on which it was based, as a starting date for its applicability. For example, when the Supreme Court ruled in *Malloy* v. *Hogan, supra,* that the Fifth Amendment privilege against self-incrimination was applicable to the states, it was a foregone conclusion that state judges and prosecutors would soon be barred from commenting at trial upon the defendant's failure to testify. Yet, when the High Court did hold that such comment was forbidden, in *Griffin* v. *California,* 380 U. S. 609 (1965), that holding was not applied to cases that were already final, even if such cases were tried after *Malloy* v. *Hogan. Tehan* v. *Shott,* 382 U. S. 406 (1966). Similarly, *Miranda* v. *Arizona* was an outgrowth of *Malloy* v. *Hogan* and of rulings applying the Sixth Amendment right to counsel, including *Escobedo* v. *Illinois.* But *Miranda* was not applied to cases tried prior to its announcement. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). Prior constitutional rulings were also the foundation of *United States* v. *Wade,* 388 U.S. 218 (1967), which held that the right to counsel attached at a line-up. See *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Escobedo* v. *Illinois, supra.* But here again the decision was held inapplicable to cases arising previous-

ly, even though such cases might have arisen after *Gideon* and *Escobedo*. *Stovall* v. *Denno*, 388 U. S. 293 (1967); see also *Desist* v. *United States*, 394 U. S. 244 (1969).

It is also immaterial that in *Baldwin* the defendant was attacking a statute. Nullification of a procedural statute by a new judicial ruling does not require retroactivity. *People* v. *Morhouse*, 21 N.Y.2d 66, 77 (1967); *People* v. *Kaiser*, 21 N.Y.2d 86 (1967), *aff'd* 394 U. S. 280 (1969); *cf. Fuller* v. *Alaska*, 393 U. S. 80 (1968); *People* v. *Tannenbaum*, 23 N.Y.2d 753 (1968).

In sum, *Baldwin* invalidated the two-century-old New York State scheme, and the date of this decision should mark its application. Appellant having been tried prior to *Baldwin*, he was not entitled to a jury trial.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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